

ISSUED NOVEMBER 4, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

SANTA ANA FOOD MARKET, INC.	)	AB-6981
dba Santa Ana Food Market)	
1216 W. First St.	)	File: 21-041134
Santa Ana, CA 92701,	)	Reg: 96036956
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 12, 1998
	)	Los Angeles, CA
)	

Santa Ana Food Market, Inc., doing business as Santa Ana Food Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale general license for ten days with all ten days stayed for a probationary period of one year, for an employee illegally purchasing federal food stamps, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and

¹The decision of the Department, dated December 4, 1997, is set forth in the appendix.

Professions Code §24200, subdivision (a), arising from a violation of Welfare and Institutions Code §10980, subdivision (g), and 7 United States Code §2024.

Appearances on appeal include appellant Santa Ana Food Market, appearing through its counsel, A. Patrick Munoz, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 9, 1975. Thereafter, the Department instituted an accusation against appellant charging that an employee, Socorro Guerrero Huerta, illegally purchased food stamps, and as support for the accusation, alleged that continuance of the license would be contrary to the public welfare and morals provisions of the state Constitution and Business and Professions Code referenced in this review.² An administrative hearing was held on August 20, 1997, at which time appellant and the Department stipulated to the facts upon which the accusation was based [RT 13].

The stipulated facts were essentially that: Huerta pled guilty to the crime charged; had been on duty as a cashier on the date of the crime; was induced to purchase food stamps at one-half their face value, which due to the discount, would benefit her personally; knew the purchase was illegal due to training; intentionally hid the transaction from her supervisor, and paid for the stamps with her own funds.

²A full reading of the accusation shows the references indicated, notwithstanding appellant's argument to the contrary (Appl. Brief, p. 3).

The United States Department of Agriculture investigated the charges, but did not impose all penalties it might have against appellant for its employee's crime.

Appellant has a reputation among members of the community as a respected service operation. Appellant does not present a law enforcement problem location, nor a public nuisance. The stipulated reputation was offered to demonstrate that the continued operation would not be contrary to public welfare and morals. It was also stipulated that the Department would offer only the facts of the crime as stipulated to, as foundation for its accusation that continuance of the license would be contrary to public welfare and morals.³

Subsequent to the hearing, the Department issued its decision which determined that appellant's license should receive some sanction for the crime proven. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the issue that appellant should not be held responsible for a single, isolated, and personal crime of its employee.

DISCUSSION

Appellant contends that it should not be held responsible for a single, isolated, and personal crime of its employee, even though committed on the licensed premises.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case

³Appellant takes some liberty with the facts, in its brief, page 3, that "the Department stipulated" that "continuation of the license would not be contrary to public welfare and morals." The record as stipulated to, is contrary to this "argument" [Exhibit B, Administrative Hearing Brief, p. 3, lines 10-14].

law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

Appellant argues that the Department's decision which connects the conduct of the employee to appellant, constitutes entrapment, since the crime could have been perpetrated elsewhere but for the conduct of the federal undercover agent choosing the premises as the site of the offer to the employee to illegally purchase the food stamps.

The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. The California Supreme Court in People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], as follows:

"... We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690) (fn. omitted)

We do not view the defense of entrapment as applicable to appellant as the circumstances and facts of the present appeal are outside the impermissible

conduct enumerated in the Barraza reasoning.

Appellant argues that good cause was not shown that continuance of the license would be contrary to public welfare and morals.

The California Constitution, article XX, §22, states in pertinent part:

“... The Department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic Beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals”

That provision of the Constitution is modified somewhat by a preceding provision which states in pertinent part:

“The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with the laws enacted by the Legislature [to grant or suspend and revoke licenses]”

Business and Professions Code §23001, in pertinent part states:

“This division [the Alcoholic Beverage Control Act, commencing with §23000] is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the People of the State of California ... It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes.”

Business and Professions Code §24200, the charging statute, states in pertinent part:

“The following are the grounds that constitute a basis for the suspension or revocation of licenses: (a) When the continuance of a license would be contrary to public welfare or morals”

In the case of Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85 [84 Cal.Rptr. 113], a case factually dissimilar to the present appeal, where the crucial issue was whether “without any evidence of

improper conduct on their [bare-breasted waitresses] part toward patrons or of the effect their presence had on the behavior of patrons, constitutes 'good cause' for the revocation of a license" The Boreta court cited the same Constitution and Business and Professions Code sections which are the focal point of this review.

We have over the years cited Boreta for its universally applicable definition of public welfare and morals:

"It seems that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interests in safety, health, education, the economy, and the political process, to name but a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable...."

(Boreta, 2 Cal.3d at 99)

Footnote 22 at page 99, states in pertinent part:

"We do not mean to intimate that the Department is confined to considering violations of criminal statutes or department directives as grounds for suspension or revocation under section 24200, subdivision (a). It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules as constituting activities contrary to public welfare or morals"

Appellant cites the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], which was actually two cases--Laube and Delena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and

the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity. The Laube portion of the decision is not applicable in the present appeal.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts. The DeLena portion is applicable in the present appeal, and is a further affirmation that imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Morell v. Department of Alcoholic Beverage Control, Harris v. Alcoholic Beverage Control Appeals Board, Mack v. Department of Alcoholic Beverage Control, and Endo v. State Board of Equalization, supra).

Appellant also cites the case of Yu v. Alcoholic Beverage Control Appeals Board (1992) 3 Cal.App.4th 286 [4 Cal.Rptr.2d 280], a case not relevant to the present appeal, as that case concerned a high crime area to the extent the licensee could not control drug transactions within the premises. The case centered on the actions creating a public nuisance, a situation not found in the present appeal.

We are mindful of the Department's exclusive powers under its police powers. The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the

Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The powers and duties of the Appeals Board differ. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.⁴

Notwithstanding appellant's acknowledged exemplary business conduct and community support, it, with all other licensed premises, is bound by the realities of the law which holds an employer responsible, to some degree, for an employee's on-premises conduct. Were it not so, an employer could act or fail to act, with impunity, thereby adversely affecting the public good -- the public welfare and morals.

But, where as here, the evidence shows great mitigation, of which the absence of knowledge is a factor, the Department should consider the innocence of

⁴The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

an employer/licensee with a just consideration of the facts and circumstances surrounding the illegal conduct of the employee.

We determine that the Department has shown proper and reasonable assessment of the crime committed, the culpable party, and the legal responsibility of appellant, and has crafted a resolution which we deem reasonable, if not charitable. While appellant may consider another alternative more desirable, where reasonable minds differ, the Department has the final word, subject only to a showing of an abuse of that discretion, which we think, has not been shown in the present appeal.

ORDER

The decision of the Department is affirmed.⁵

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party may, before this final order becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.